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5 **IN THE UNITED STATES DISTRICT COURT**  
6 **FOR THE DISTRICT OF ARIZONA**  
7

8 Michael Dunton,

9 Plaintiff,

10 v.

11 AEA Federal Credit Union, et al.,

12 Defendants.  
13

No. CV-18-02652-PHX-JGZ

**ORDER**

14 Pending before the Court is Defendant AEA Federal Credit Union's motion for  
15 summary judgment on the sole claim in the first amended complaint, that AEA terminated  
16 Plaintiff Michael Dunton in violation of the Federal Credit Union Act (FCUA), 12 U.S.C.  
17 § 1790b(a)(1), for engaging in protected whistleblowing activity. (Doc. 50.) The motion  
18 has been fully briefed. (Docs. 54, 56.) The Court will grant the motion.

19 **I. Background<sup>1</sup>**

20 AEA is a federally chartered credit union. (Doc. 51, ¶ 1.) Between 2010 and 2015,

21  
22 <sup>1</sup> The facts in the Background section are undisputed except where noted. The  
23 Court's task of identifying the undisputed facts was made difficult by Plaintiff's failure to  
24 comply with LRCiv. 56.1(b)(1), which requires a party opposing a motion for summary  
25 judgment to file a statement, setting forth "for each paragraph of the moving party's  
26 separate statement of facts, a correspondingly numbered paragraph indicating whether the  
27 party disputes the statement of fact set forth in that paragraph . . . ." LRCiv. 56.1(b)(1).  
28 Plaintiff failed to state whether he disputed the facts in each of Defendant's paragraphs.  
Plaintiff submitted a separate statement of facts plus a "contravening" statement of facts;  
the two statements duplicate each other as to some facts yet fail to respond to many of  
Defendant's separately numbered facts. Moreover, Plaintiff failed to provide critical  
foundational information for many of his factual assertions, for example, dates, which  
made it difficult to determine whether Plaintiff was disputing a particular fact asserted by  
Defendant. After careful review of the filings, the Court has identified the facts that  
Plaintiff does not deny, and which are therefore admitted.

1 AEA was placed into conservatorship by the National Credit Union Administration  
 2 (NCUA). (*Id.*, ¶ 2.) During the time relevant to this action, AEA was required to undergo  
 3 NCUA examination twice a year. (*Id.*)

#### 4 **Dunton's employment at AEA**

5 Plaintiff Michael Dunton was employed as AEA's Vice President of Accounting and  
 6 Finance from July 13, 2016 to August 23, 2017.<sup>2</sup> (Doc. 51, ¶¶ 3, 63; Doc. 55, ¶ 1.) Prior  
 7 to his employment at AEA, Dunton had never worked for a credit union. (Doc. 51, ¶ 6.)

8 Dunton initially reported to Adele Sandberg, who was the Executive Vice President.  
 9 (Doc. 51, ¶ 4.) His duties included oversight of accounting and finance, maintaining  
 10 AEA's accounting records, management, board and regulatory reporting, and providing  
 11 financial forecasts, including financial forecasts for the NCUA as part of the examination  
 12 process. (Doc. 51, ¶¶ 4, 5; Doc. 55, ¶¶ 2, 25.)

13 From the beginning of Dunton's employment, Dunton performed poorly. (Doc. 51, ¶  
 14 7.)<sup>3</sup> Dunton admits that he regularly failed to meet deadlines and his work product often  
 15 contained errors. (*Id.*, ¶ 9; Doc. 55, ¶ 28.) He attributes these failings to poor staffing  
 16 decisions by Sandberg and "arbitrary deadlines" imposed by Sandberg. (Doc. 55, ¶ 28.)

17 AEA was specifically concerned about Dunton's preparation of financial documents.  
 18 In 2016, Dunton was required to prepare a financial budget for 2017. (Doc. 51, ¶ 8.) AEA  
 19 concluded that Dunton's knowledge was so lacking that AEA brought in a third-party  
 20 consultant, Dan Olejnik, to prepare the necessary information for a NCUA examination.  
 21 (*Id.*) In a memo to Sandberg, dated February 5, 2017, Olejnik wrote that "significant"  
 22 problems with the 2017 budget were caused by Gagnon's departure and Dunton's general

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23 <sup>2</sup> Dunton's exact title is disputed, but not relevant to the Court's decision. AEA refers  
 24 to Dunton as the Vice President of Finance (Doc. 51, ¶ 3), while Dunton states he was the  
 25 Vice President of Accounting and Finance. (Doc. 55, ¶¶ 1, 24.)

26 <sup>3</sup> Dunton initially appears to controvert the suggestion that his performance was poor,  
 27 asserting that no record of his performance exists before February of 2017, and only then  
 28 for an "overreaction to an inconsequential mistake made by [his] subordinate that was  
 quickly remedied." (Doc. 55, ¶ 26.) However, Dunton admits that in early February 2017,  
 he was placed on a Performance Improvement Plan because of performance deficiencies  
 occurring prior to that date. (Doc. 51, ¶ 12; Doc. 55, ¶ 31.)

1 lack of knowledge to carry the budget through to completion. (Doc. 51, ¶ 10; Doc. 51-1,  
 2 pp. 60-62.) In the memo, Olejnik also concluded that “ [t]he reason for the disastrous  
 3 change in loan income is that Michael [Dunton] did not notice that the December loan file  
 4 he imported was corrupted.” (Doc. 51-1, p. 60.) As a result, business term loan income  
 5 doubled from the approved budget and, as business real estate balances increased mid-  
 6 year, there was no associated monthly change in interest income. (*Id.*) Olejnik found that  
 7 not all indices were identified properly and accounting for securities was suspect for  
 8 various reasons. (*Id.*)<sup>4</sup>

9 Dunton does not dispute that AEA hired Olejnik to prepare necessary information for  
 10 a NCUA examination in 2016 or that Olejnik wrote the February 5, 2017 memo; he states  
 11 that Olejnik assisted Ryan Gagnon, the financial analyst, not Dunton. (Doc. 55, ¶ 27.)  
 12 He also states that he was not the user of Firserv Vantage Program and the corrupted file  
 13 was imported by Gagnon. (*Id.*, ¶ 29.)

#### 14 **Dunton’s Proposed Termination and Performance Improvement Plan.**

15 On February 3, 2017, Sandberg sent a memorandum to AEA’s then-President and  
 16 CEO, Brian Mendivil, recommending Dunton’s termination. (Doc. 51, ¶ 11.) Sandberg  
 17 wrote that Dunton consistently failed to meet deadlines, failed to conduct routine  
 18 meetings, and failed to inspect the work product of his employees, “resulting in errors in  
 19 Board, ALCO and budget reports.” (*Id.*) Dunton was unaware at the time that Sandberg  
 20 had recommended his termination. (Doc. 55, ¶ 30.) Dunton concedes that “mistakes were  
 21 made,” but claims they were “blown out of proportion.” (*Id.*) He attributes the mistakes  
 22 to the fact that Sandberg left him with an inexperienced staff that were poorly trained or  
 23 had exhibited performance issues in the past. (*Id.*)

24 Sandberg and Mendivil decided to place Dunton on a performance improvement plan

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 26 <sup>4</sup> In his Controverting Statement of Facts, Dunton states that Olejnik’s “first visit . . .  
 27 coincided with [Dunton’s] . . . first week of employment” with AEA, suggesting that  
 28 Dunton was a new employee at the time. (Doc. 55, ¶ 27.) However, Olejnik’s February  
 5, 2017 memo indicates that it pertains to Olejnik’s “NOTES FROM THIRD VISIT,” not  
 the first visit. (Doc. 51-1, p. 60.) In February 2017, Dunton would not have been in his  
 first week of employment at AEA.

(PIP) rather than terminate him because it was difficult to find qualified candidates for Dunton's position in Yuma. (Doc. 51, ¶ 12.) Sandberg met with Dunton on February 8, 2017 and outlined the requirements for his PIP. (*Id.*, ¶ 13.) Sandberg issued a written "30-Day Performance Improvement Plan" to Dunton that same day. (*Id.*; *see also* Doc. 51-1, pp. 72-73.) The PIP required Dunton to (1) meet a four-day month end close; (2) implement a validation process; (3) correct mistakes within AEA's accounting and finance software, Vantage and Prologue; (4) improve communication with employees and senior leadership; and (5) complete project plans for strategic options as identified in the strategic plan. (Doc. 51, ¶ 14.) Dunton does not dispute these facts. He adds that termination was not discussed in the creation of the PIP, but was left as an option if Dunton did not convince the executive team at the end of thirty days that he took their concerns seriously. (Doc. 55, ¶ 31.) Dunton notes that he remained in his position at the end of the 30-day period, implying thereby that his performance improved. (*Id.*)

However, on February 22, 2017, AEA provided Dunton with a performance review for 2016. (Doc. 51, ¶ 15.) On a scale of 1: Immediate Improvement Required to 4: Outstanding, Dunton received an overall score of 1.35. (*Id.*) Some of Sandberg's comments included: Dunton fails to meet deadlines, including the month end close; fails to deliver accurate data, mostly because he does not inspect the work of his staff; fails to communicate effectively with his manager, peers and the Board of Directors; is unfamiliar with the ALLL and has not familiarized himself with related GAAP; fails to refer to applicable rules and regulations and policies and procedures; has not owned issues and failures, often putting those on people of the past or staff within the department even though he is ultimately responsible; and does not work as a team. (*Id.*, ¶ 16.) In addition, on March 22, 2017, Sandberg issued an update to Dunton's PIP. (*Id.*, ¶ 17.) In the update, Sandberg noted Dunton had improved in some areas, but still required improvement in several other areas. (*Id.*) The update required Dunton to: (1) implement review processes for month end closing and board packet schedules; (2) create a budget variance report to be included in the Board packet quarterly; (3) correct issues with Vantage and Prologue;

(4) conduct 1:1 meeting with direct reports; and (5) complete project plans for strategic options as identified within the strategic plan. (*Id.*)

**Sandberg's promotion to CEO.**

In May 2017, AEA's Board of Directors removed Mendivil as President/CEO of AEA and appointed Sandberg to replace him. (Doc. 51, ¶ 22.)

**Complaints about Dunton's behavior.**

AEA received complaints about Dunton's behavior. (*Id.*, ¶ 18.) An August 18, 2017 Corrective Action Document describes complaints that Dunton verbally disparaged an employee to another employee on August 3, 2017, and on August 10, 2017, he responded to an executive team member in a hostile manner causing other employees to feel uncomfortable. (*Id.*, ¶¶ 19-20 (citing Doc. 51-9, pp. 89-91.)) AEA also asserts, and Dunton admits, that Dunton encouraged an employee to take a job with a competitor. (Doc. 51, ¶ 21; Doc. 55, ¶ 36.)

Dunton states that he never received any complaints about his behavior and did not know about the Corrective Action Document until his September 2019 deposition. (Doc. 55, ¶ 34.) Dunton acknowledges an incident with an executive team member, but disputes AEA's characterization of his conduct. (*Id.*, ¶ 35.) Dunton states that the member "mockingly asked if [Dunton] would like a hug from them. [Dunton] was taken back at this unwanted physical advance . . . but did not threaten them in any way." (*Id.*) Dunton does not deny that he responded in a hostile manner.

**Dunton's Failure to Complete Necessary Financial Forecasts.**

An NCUA examiner was scheduled to visit AEA for an examination in August 2017. (Doc. 51, ¶ 23.) Sandberg asked Dunton to prepare a financial forecast for 2018, which was necessary for the NCUA examination and for AEA's own internal procedures. (*Id.*, ¶¶ 23-24.) Sandberg asked Dunton to create financial forecasts with three scenarios: (1) most likely; (2) best case; and (3) worst case. (*Id.*, ¶ 25.) AEA regularly completed forecasts with different scenarios and Olejnik had prepared the same type of forecast the prior year. (*Id.*, ¶ 26.) Dunton's 2016 performance review specifically referenced the

1 need for him to “assess historical and desired performance and plan and forecast  
2 accordingly with reasonable expectation to achieve forecasted results.” (*Id.*, ¶ 27.) Dunton  
3 agreed to prepare the forecasts and did not raise any concerns at that time. (*Id.*, ¶ 28.) The  
4 forecasts were due on August 1, 2017. (*Id.*)

5 Dunton did not deliver the required forecasts by August 1, 2017, but instead provided  
6 an incomplete “working document” on August 3, 2017. (*Id.*, ¶ 29.) Sandberg noted that  
7 the document did not contain necessary information such as written assumptions, capital  
8 expenditures, and details on operating expenses and once again had to ask for Dunton to  
9 provide the necessary information. (*Id.*, ¶ 30.) Dunton does not dispute that he did not  
10 deliver the required forecasts by August 1, but states that he presented Sandberg with the  
11 financial forecast basis, which she rejected. (Doc. 55, ¶ 38.)

12 On August 7, 2017, Sandberg met with Dunton to inquire about the status of the  
13 forecasts. (Doc. 51, ¶ 31.) Dunton had still not completed the forecasts and provided  
14 Sandberg with some incomplete estimates. (*Id.*) Dunton noted that AEA had net income  
15 of \$2,031,702 in 2016, but projected that AEA would most likely have net income of  
16 \$514,606 in 2017 and \$172,583 in 2018. (*Id.*, ¶ 32.) Sandberg expressed concern that  
17 Dunton was not taking relevant factors into consideration and that the estimates were too  
18 low. (*Id.*, ¶ 33.) Sandberg also noticed that the forecasts had some mistakes, such as  
19 including expenses for programs that were no longer being used. (*Id.*) Sandberg asked  
20 Dunton to revise the forecasts based on AEA’s past and current performance. (*Id.*, ¶ 34.)  
21 Dunton said he would revise his forecast and provide Sandberg with final forecasts. (*Id.*;  
22 Doc. 55, ¶ 40.) Dunton states that Sandberg continued to reject his work without  
23 specifically detailing what she was objecting to. (Doc. 55, ¶¶ 39, 41, 42.)

24 On August 16, 2017, Dunton provided some draft income statement forecasts with  
25 three scenarios: (1) Most Likely (Base); (2) Best Case (High); and (3) Worst Case (Low).  
26 (Doc. 51, ¶ 35.) His most likely scenario had net income of \$674,300 for 2017<sup>5</sup>— a  
27 significant decrease of \$1,357,402 from net income of \$2,031,702 in 2016. He then

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28 <sup>5</sup> Given the context, the Court presumes that Defendant meant 2017, not 2016.



1 projected net income of \$1,648,091 for 2018, which was \$383,611 lower than 2016. (*Id.*)  
2 In his High Case, Dunton projected net income of \$1,046,250 in 2017 and \$1,535,280 in  
3 2018, respective differences of \$985,452 and \$496,422 from 2016's net income. (*Id.*, ¶  
4 36.) Dunton's Low Case forecast had net income of \$682,668 for 2017, which was higher  
5 than his Most Likely scenario. (*Id.*, ¶ 37.) He then projected net income of -\$361 for 2018.  
6 (*Id.*)

7 The forecasts concerned Sandberg because they failed to take into consideration  
8 AEA's past performance and the fact that AEA was performing well (*Id.*, ¶ 38.) The  
9 forecasts also had obvious mistakes, such as the low estimate being higher than the most  
10 likely estimate. (*Id.*, ¶39.) Dunton does not dispute the numbers in his forecasts, other  
11 than to state the numbers were "preliminary" and were not finalized. (Doc. 55, ¶¶ 43, 44,  
12 45.) Dunton, nonetheless, asserts there were no errors in the forecasts. (*Id.*, ¶ 47.)<sup>6</sup>

13 On August 16, 2017, Sandberg emailed Dunton and outlined the requirements she was  
14 seeking for the forecasts. (Doc. 51, ¶ 40 (citing Doc. 51-1, pp. 129-130).) According to  
15 Sandberg, during this process, Dunton had a fundamental misunderstanding of what he  
16 was asked to do despite Sandberg's instructions. (*Id.*, ¶ 41.) At his deposition, Dunton  
17 testified that he was not actually doing what Sandberg had requested, but was calculating  
18 "the most-likely scenario and then two lower scenarios . . . ." (*Id.*, ¶ 41.) In his later  
19 affidavit, Dunton stated that he gave three sets of numbers: high case, low case and most  
20 likely. (Doc. 55, ¶ 49.)

21 During August 2017, Dunton provided Sandberg with a variety of different "working  
22 documents" which contained very different numbers. (Doc. 51, ¶ 44.) He was required  
23 to have a completed, fully documented forecast before the NCUA exam started on August  
24 14, 2015. (*Id.*)

25 On August 18, 2017, Dunton still had not completed the required financial forecasts.  
26 (*Id.*, ¶ 45; Doc. 55, ¶ 53.) Dunton met with Sandberg that day and stated that he believed  
27 AEA would have 2018 net income of between \$0 and \$1 Million. (Doc. 51, ¶ 45.)

28 <sup>6</sup> Dunton does not explain how it would not be a mistake that his low estimate was  
higher than his most likely scenario estimate.

1 Sandberg gave Dunton a deadline of August 23, 2017 to complete the forecasts. (*Id.*, ¶  
2 48.)

3 After meeting with Dunton on August 18, 2017, Sandberg met with Human Resources  
4 Director Regina Twomey and Vice President of Commercial Lending Darrin Davidson  
5 and told them that Dunton had failed to complete the financial forecasts and that he had a  
6 deadline of August 23, 2017 to prepare the forecasts and present them to the NCUA  
7 examiner. (*Id.*, ¶ 49.) Sandberg stated that if Dunton did not do so, they were to terminate  
8 his employment.<sup>7</sup> (*Id.*)

9 According to Dunton, Sandberg sharply criticized him during the August 18 meeting  
10 primarily because she felt that his financial forecast for 2018 was too low. (Doc. 55, ¶  
11 14.) In addition, Dunton states that Sandberg told him twice at meeting end that he was  
12 not to talk to NCUA examiner Charles Stanley at all and, if he did, she would consider  
13 such communication insubordination. (*Id.*, ¶ 15.)

14 Dunton did not complete the forecasts by the deadline. (Doc. 51., ¶ 51; Doc. 55, ¶ 53.)  
15 Dunton did not offer the forecast because Sandberg refused to accept the net income  
16 amount. (Doc. 55, ¶ 53.) Dunton does not dispute that at some point, he told Sandberg  
17 that creating different forecast scenarios was a waste of time. (Doc. 51, ¶ 43; Doc. 55, ¶  
18 50.) According to Dunton, that is because Sandberg continuously objected without giving  
19 any specific reasons for her objections.<sup>8</sup> (Doc. 55, ¶ 50.)

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20  
21 <sup>7</sup> Sandberg was planning to be out of town on August 23. (Doc. 51-1, ¶35.)

22 <sup>8</sup> The parties dispute how much direction Sandberg did or did not give Dunton.  
23 The record includes the August 16, 2017 email exchange between Sandberg and Dunton,  
24 detailing some information that needed to be included in the forecast, and Dunton's  
25 response to the email. The email reads:

26 Michael,  
27 You need to include the underlying assumptions for the three scenarios and our strategies  
28 to support the scenarios. The scenarios are (1) Most Likely (Base), (2) Best Case (High)  
and (3) Worst Case (Low) and each have assumptions, please update memo with the high  
level assumptions for both the balance sheet and income statement. I also asked for a list  
of major capital outlays – the total for each project, the portion that is capitalized and the  
associated maintenance in addition to identifying the “swap” costs. What expense, annual,  
is being removed or “swapped” by the new outlay and where do we see that in the income  
statement. Also need to make sure we know what is still being determined - ask Jose



1 Dunton states that after Sandberg prohibited him from meeting with Stanley or giving  
 2 him anything, Dunton was in limbo as he no longer could produce a new forecast with a  
 3 higher number for net income without it being an attempt at fraud toward the NCUA and  
 4 others. (Doc. 55, ¶ 56.) According to Dunton, at no time did Sandberg communicate with  
 5 him from that point forward. (*Id.*)

6 **Dunton’s meeting with NCUA Examiner, Charles Stanley.**

7 On or around August 21, 2017, Sandberg instructed Anna Corona to set up a meeting  
 8 with Dunton and NCUA examiner Stanley. (Doc. 51, ¶ 50.) Corona attempted to schedule  
 9 a meeting, but Dunton refused, stating he had been told not to meet with Stanley. (Doc.  
 10 51, ¶ 52; Doc. 55, ¶¶ 17, 57.)

11 Dunton did meet with Stanley on August 22, 2017. (Doc. 51, ¶ 53; Doc. 55, ¶¶ 58, 59.)  
 12 According to Dunton, Stanley came into Dunton’s office, after closing time, uninvited, to  
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14 there are a couple of Core items we do not have costs for and we should note that  
 15 Correlation costs will most likely increase and join the 5-year amortization. Eugene’s list  
 16 can be improved by having a page that details the outlays, segregated by capital and  
 17 recurring maintenance, the amortized/prepaid term, the monthly impact and the period the  
 expense begins. Eugene pretty much has it but his document does not total the outlays.  
 His second sheet is fine for now as your commentary can tell readers where to find the  
 expenses and what are increases and what are decreases.

18 As you know, I’ve requested detail and that request still stands – need 2017 to roll by  
 19 month from July since we have closed books to year end for both balance sheet and  
 20 income statement. 2018 should have each month with the income statement ending with  
 totals. Behind that, comparisons to actual 2016, forecast 2017, budget 2017 and forecast  
 21 2018. We can talk about just how much detail – the Balance Sheet has too much. Need  
 underlying assumptions – growth, major capital outlays, major expenses (salary &  
 22 benefits, PLLL, Legal, etc.), other income movements, RATES.

23 I hope to have time on Friday to meet with you in hopes the re-forecast and forecast can  
 24 meet my expectations by an agreed upon date and that date will be no later than mid-  
 September.

25 Thanks, Adele  
 26 Adele Sandberg  
 27 President & CEO

28 (Doc. 51-1, pp. 129-130.) Dunton replied to the email, asking for examples of what  
 Sandberg “wanted expanded in describing the assumptions.” (*Id.*, p. 129.)

1 meet. (Doc. 55, ¶¶ 18, 58, 63.) Dunton told Stanley that he was prohibited by Sandberg  
2 from speaking with him and giving him any forecast. (*Id.*, ¶ 59.) Dunton told Stanley,  
3 verbally, what he had forecasted for 2017 and 2018. (*Id.*) Dunton told Stanley that he  
4 expected AEA to have 2018 net income of between \$0 and \$1 Million. (Doc. 51, ¶ 54;  
5 Doc. 55, ¶ 59.) Dunton testified that he also told Stanley that Sandberg thought the  
6 forecast numbers should be higher. (Doc. 51, ¶ 55.)

7 **Dunton's termination.**

8 On August 23, 2017, Sandberg spoke to Twomey and Davidson while she was out of  
9 town attending a conference. (Doc. 51, ¶ 59.) She asked whether Dunton had completed  
10 the financial forecasts and presented them to Stanley. (*Id.*) Twomey and Davidson  
11 confirmed with Stanley that Dunton had not provided him with the financial forecasts.  
12 (*Id.*, ¶ 60.) They informed Sandberg, and she instructed them to terminate Dunton's  
13 employment. (*Id.*, ¶ 61.)

14 Twomey and Davidson met with Dunton on August 23, 2017 and informed him that  
15 he was terminated because he was not getting his work done and that he had threatened or  
16 harassed other employees. (Doc. 51, ¶ 63.) Neither Dunton nor Stanley told Sandberg,  
17 Twomey, or Davidson that Dunton claimed to have reported illegal conduct to Stanley or  
18 to have reported to Stanley that Sandberg wanted him to produce forecasts that were too  
19 high. (Doc. 51, ¶ 62; Doc. 55, ¶ 62.) At the time Dunton was terminated, Sandberg,  
20 Twomey, and Davidson were unaware that Dunton claimed to have reported potential  
21 illegal conduct to Stanley on August 22, 2017. (Doc. 51, ¶¶ 64, 66.) Dunton admits that  
22 he did not tell anyone at AEA about his conversation with Stanley, and Dunton has no  
23 information that Stanley told anyone about Dunton's alleged complaints. (*Id.*, ¶ 65.)

24 **Dunton's claim regarding protected activity.**

25 Dunton's testimony about the substance of his meeting with Stanley is found in the  
26 transcript of his September 25, 2019 deposition and in his affidavit, signed on January 25,  
27 2020.

28 Dunton testified at his deposition and in his affidavit that he told Stanley that Sandberg

1 prohibited him from speaking with Stanley or giving him anything. (Doc. 51-1, pp. 37-38;  
2 Doc. 55, ¶¶ 19, 59, 62.) Dunton testified at deposition that he informed Stanley that  
3 Sandberg thought the forecast numbers should be higher (Doc. 51, ¶ 55), and he testified  
4 that he believed that it would have been fraudulent to present a forecast to the NCUA with  
5 numbers that were too high. (Doc. 51, ¶ 56.)

6 At his deposition, Dunton testified that he reported to Stanley only that he and  
7 Sandberg had different opinions about projected net income for AEA in 2018 and that  
8 Sandberg thought the net income projections should be higher. (Doc. 51, ¶ 76.) In his  
9 affidavit, Dunton states that he also informed Stanley that he was being pressured by  
10 Sandberg to inflate the numbers. (Doc. 55, ¶ 68.) Dunton “believes it would be illegal  
11 for Ms. Sandberg to prohibit him from speaking with a NCUA examiner given the fact  
12 that Ms. Sandberg had continuously pressured Plaintiff into falsely inflating the forecast  
13 numbers, which is fraudulent conduct, and Plaintiff *would* have informed such to the  
14 examiner.” (Doc. 55, ¶ 74 (emphasis added); *see also* Doc. 51, ¶ 83.) Dunton believes  
15 that Sandberg thought AEA could escape Special Actions by NCUA if AEA maintained  
16 a .70% return on assets, and therefore pressured him to commit fraud to elevate the 2018  
17 financial forecast. (Doc. 55, ¶ 23.)

18 Although Dunton claims that Sandberg rejected his forecasts because she wanted the  
19 numbers to be higher, Dunton concedes that Sandberg never told Dunton what she thought  
20 the net income should be and never asked him to falsify any financial statements. (Doc.  
21 51, ¶ 79; Doc. 55, ¶ 71.) Dunton testified that no one at AEA asked him to falsify any of  
22 the underlying financial data and Sandberg never asked him to “puff up” the forecast  
23 numbers.” (Doc. 51, ¶ 58.) Dunton states in his affidavit, that there was “a clear  
24 implication” that the net figures Plaintiff provided Sandberg were too low, because she  
25 repeatedly rejected his numbers and because Sandberg stressed in a July manager’s  
26 meeting the importance of maintaining minimum levels of income for certain reasons.  
27 (Doc. 55, ¶ 61; *see also* Doc. 55, ¶ 51.)

28 During his deposition, Dunton first testified that he did not report any illegal conduct

1 to Stanley and that he had not witnessed any illegal conduct. (Doc. 51, ¶ 77.) He testified  
 2 that he did not report any type of illegal conduct to anyone within AEA such as the board  
 3 or any other executives because “[a]gain, I don’t believe I have ever witnessed any illegal  
 4 conduct.” (Doc. 51-1, p. 41.) After conferring with counsel during a break, Dunton  
 5 testified that what he told Stanley that he believed was illegal conduct, was that he was  
 6 being forced to provide a forecast well beyond what he thought was appropriate and that  
 7 it was misrepresenting the strength of AEA’s earnings. (Doc. 51, ¶ 78; Doc. 51-1, p. 56.)  
 8 In his affidavit, Dunton states his subsequent testimony about the illegality of a high  
 9 forecast was a clarification of his earlier testimony that he did not report or see any illegal  
 10 conduct. (Doc. 55, ¶ 70.) Dunton further asserts in his affidavit, that he told Stanley that  
 11 he was being pressured by Sandberg to inflate the numbers. (Doc. 55, ¶ 62.)

12 Dunton acknowledged at his deposition that forecasts are estimates based on the  
 13 opinions of the people creating the forecast. (Doc. 51-1, p. 25.) Dunton acknowledged  
 14 that it is possible that different people could have different opinions about what a forecast  
 15 should be: “If you had ten different people, you would get ten different answers.” (Doc.  
 16 51, ¶ 42.) Dunton explained at deposition that he believed that Sandberg wanted him to  
 17 “create forecasts that would be against [his] . . . professional *opinion*.” (Doc. 51-1, p. 25  
 18 (emphasis added).)

19 Dunton testified that he was not aware of any statutes or regulations that governed  
 20 what had to be included in any forecast to the NCUA, and that Dunton reported no  
 21 violation or statute or regulation to Stanley. (Doc. 51, ¶¶ 78, 81; Doc. 51-1, p. 28; *see also*  
 22 Doc. 55, ¶¶ 70, 73.) Dunton also acknowledged that the NCUA had access to the  
 23 underlying financial data behind the forecasts, so it could have confirmed or disputed a  
 24 forecast provided by AEA. (Doc. 51, ¶¶ 57, 82.)<sup>9</sup> After AEA terminated Dunton, it  
 25 discovered that Dunton had multiple different spreadsheets with different forecasts. (Doc.  
 26 51, ¶ 85.) Virtually all of the spreadsheets contained errors and improper data. (*Id.*) In  
 27 his affidavit, Dunton states that if errors were made, it was the lack of specific detail from

28 <sup>9</sup> In his later affidavit, Dunton contends he does not know what the NCUA would  
 have done. (Doc. 55, ¶ 60.)

1 Sandberg which was the cause of it. (Doc. 55, ¶ 76.)

2 **Dunton's Amended Complaint.** Dunton's sole claim is for retaliation under FCUA,  
3 12 U.S.C. § 1790b. (Doc. 7.) Dunton alleges that AEA terminated his employment in  
4 retaliation for his reporting AEA violations of federal law to Stanley.

5 **AEA's Motion for Summary Judgment.**

6 AEA seeks summary judgment on three grounds. AEA argues (1) Dunton fails to  
7 establish a causal connection between his termination and his alleged whistleblowing  
8 activity; (2) Dunton did not engage in protected activity because he did not report a  
9 violation of a law or regulation as required for whistleblower protection; and (3) AEA had  
10 a legitimate, non-retaliatory reason for Dunton's termination that was not a pretext for  
11 retaliation. If the Court does not grant summary judgment on Dunton's retaliation claim,  
12 AEA seeks summary judgment on damages, asserting Dunton failed to mitigate his  
13 damages. (Doc. 50.)

14 The Court concludes that summary judgment is properly entered because Dunton fails  
15 to establish a causal connection between his termination and his alleged whistleblowing  
16 activity and also because AEA had a legitimate, non-retaliatory reason for Dunton's  
17 termination that was not a pretext for retaliation. Having found two of the bases for  
18 summary judgment dispositive of this case, the Court does not address AEA's remaining  
19 arguments.

20 **II. Legal Standards**

21 **A. Summary Judgment**

22 Summary judgment is appropriate when: (1) the movant shows that there is no genuine  
23 dispute as to any material fact; and (2) that after viewing the evidence most favorably to  
24 the non-moving party, the movant is entitled to prevail as a matter of law. Fed. R. Civ. P.  
25 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N.*  
26 *Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987). "Only disputes over facts that might affect  
27 the outcome of the suit under the governing [substantive] law will properly preclude the  
28 entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

1 A “genuine issue” of material fact arises only “if the evidence is such that a reasonable  
2 jury could return a verdict for the nonmoving party.” *Id.*

3 When considering a motion for summary judgment, the court accepts as true the non-  
4 moving party’s evidence, if it is supported by affidavits or other evidentiary material.  
5 *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. The non-moving party may not  
6 merely rest on its pleadings; the non-moving party must produce some significant  
7 probative evidence tending to contradict the moving party’s allegations, thereby creating  
8 a material question of fact. *Anderson*, 477 U.S. at 256–57 (plaintiff must present  
9 affirmative evidence to defeat properly supported motion for summary judgment); *see*  
10 *also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986)  
11 (nonmovant must present more than “some metaphysical doubt as to the material facts”).  
12 A summary judgment motion cannot be defeated “with allegations in the complaint, or  
13 with unsupported conjecture or conclusory statements.” *Hernandez v. Spacelabs Med.*  
14 *Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). “Summary judgment must be entered ‘against  
15 a party who fails to make a showing sufficient to establish the existence of an element  
16 essential to that party’s case, and on which that party will bear the burden of proof at  
17 trial.’” *United States v. Carter*, 906 F.2d 1375, 1376 (9th Cir. 1990) (quoting *Celotex*,  
18 477 U.S. at 322).

### 19 **B. Elements of Retaliation Claim**

20 Pursuant to the FCUA:

21 No insured credit union may discharge or otherwise discriminate against any  
22 employee with respect to compensation, terms, conditions, or privileges of  
23 employment because the employee (or any person acting pursuant to the  
24 request of the employee) provided information to the Board or the Attorney  
25 General regarding any possible violation of any law or regulation by the  
26 credit union or any director, officer, or employee of the credit union.

27 12 U.S.C. § 1790(b)(a)(1). To establish a prima facie claim of retaliation under this  
28 provision, a plaintiff must demonstrate that: (1) he engaged in protected activity; (2)  
defendant knew of this exercise of his protected rights; (3) defendant subsequently took  
an employment action adverse to the plaintiff; and (4) there was a causal connection



1 between the protected activity and the adverse employment action.<sup>10</sup> *Kittle v. C-Plant*  
 2 *Fed. Credit Union*, No. 5:08-CV-00114-R, 2010 WL 1949675, at \* 2 (W.D. Ky. May 13,  
 3 2010) (citing *McNett v. Hardin Cmty. Fed. Credit Union*, 118 F. App'x 960, 964 (6th Cir.  
 4 2004)).

5 Once the plaintiff has established a prima facie case of retaliation, the burden shifts to  
 6 the defendant to articulate a nonretaliatory reason for the action taken. *Kittle*, 2010 WL  
 7 1949675, at \* 2 (citing *McNett*, 118 F. App'x at 194). The burden on the defendant at this  
 8 phase is one of production rather than persuasion. *Reeves v. Sanderson Plumbing Prods.,*  
 9 *Inc.*, 530 U.S. 133, 142 (2000). If the defendant proffers a legitimate nonretaliatory reason  
 10 for the adverse employment action, the burden shifts back to the plaintiff to show that the  
 11 defendant's stated reason was pretextual. *Kittle*, 2010 WL 1949675, at \* 2 (citing *McNett*,  
 12 118 F. App'x at 194). "To do so, [the plaintiff] must show either: '(1) that the proffered  
 13 reasons had no basis in fact; (2) that the proffered reasons did not actually motivate the  
 14 decision; or (3) that they were insufficient to motivate the employment decision.'" *Id.*  
 15 (quoting *McNett*, 118 F. App'x at 194). The "plaintiff must prove, by a preponderance of  
 16 the evidence that the defendant's real motive for the adverse action was the plaintiff's  
 17 protected activity." *Bohac v. Kellogg Co. Emp. Fed. Credit Union*, No. 8:11 CV338, 2012

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18  
 19 <sup>10</sup> No Ninth Circuit case specifically identifies the elements of a prima facie case  
 20 under § 1790b(a)(1). Because case law interpreting § 1790b is sparse, "courts have looked  
 21 to case law construing comparably-phrased anti-retaliation provisions in other federal  
 22 employment-discrimination statutes, such as Title VII, 42 U.S.C. § 2000e *et seq.*, the  
 23 Americans with Disabilities Act (ADA), *id.* § 12101 *et seq.*, and the Age Discrimination  
 24 in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, as well as other federal  
 25 whistleblower statutes, such as the False Claims Act (FCA), 31 U.S.C. § 3730(h), the  
 26 Safety Transportation Assistance Act (STAA), 49 U.S.C. §§ 31105(a)(1)(A), and  
 27 FIRREA § 1831j(a)(1)." *Simas v. First Citizens' Fed. Credit Union*, 170 F.3d 37, 43–44  
 28 (1st Cir. 1999) (citations omitted). Here, the parties agree that the elements identified in  
*Kittle* apply to this case. (Doc. 50, p. 10; Doc. 54, pp. 11–12.) The Court notes that the  
 test enunciated in *Kittle* is consistent with that applied by the Ninth Circuit in Title VII  
 cases. *See e.g. Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1196–97  
 (9th Cir. 2003) (prima facie case of retaliation under Title VII requires evidence that (1)  
 plaintiff engaged in a protected activity, (2) plaintiff suffered an adverse employment  
 action, and (3) there was a causal link between plaintiff's activity and the employment  
 decision; plaintiff must also make showing sufficient for a reasonable trier of fact to infer  
 that the defendant was aware that the plaintiff had engaged in protected activity); *and Ray*  
*v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000) (applying burden-shifting framework  
 to retaliation claims under Title VII).

1 WL 12884779, \*4 (D. Neb. Dec. 28, 2012) (applying § 1790b).

### 2 III. Discussion

#### 3 A. Plaintiff cannot show a causal connection between his alleged protected 4 activity and his termination.

5 Dunton fails to make a showing sufficient to establish the existence of a causal  
6 connection between his alleged protected activity and his termination, an element essential  
7 to his case, and on which he will bear the burden of proof at trial. Assuming the  
8 information Dunton relayed to Stanley was protected activity because it disclosed a  
9 violation of federal law by AEA,<sup>11</sup> Dunton fails to present any evidence that he was fired  
10 on account of his reporting the illegal conduct to Stanley. Dunton fails to point to any fact  
11 showing that any of the individuals involved in his termination knew that he told, or  
12 claimed to have told, Stanley about alleged illegal conduct by AEA. Indeed, the only  
13 evidence is to the contrary: Sandberg, the person who made the decision to terminate

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14  
15 <sup>11</sup>The FCUA “narrowly prohibits retaliation based on the report of a possible legal  
16 violation to either the NCUA Board or the U.S Attorney General.” *Schroeder v. Greater*  
17 *New Orleans Fed. Credit Union*, 664 F.3d 1016, 1023 (5th Cir. 2011) (citing *Bruns v.*  
18 *Nat’l Credit Union Admin.*, 122 F.3d 1251, 1254–55 (9th Cir. 1997) and additional  
19 authority). “A plaintiff invoking the protection of § 1790b should be prepared to point the  
20 court to his or her specific communication to the NCUA or Attorney General, describing  
an alleged violation of law or regulation, real or ‘possible.’” *Bohac*, 2012 WL 12884779,  
at \*4 (citing *Schroeder*, 664 F.3d at 1023). If a plaintiff has no reasonable belief of a  
violation, his claim must fail. *Id.* (citing *Green*, 507 F.3d 662 (if plaintiff had no reason  
to believe there was a false or fraudulent claim, he is not protected from retaliation under  
the False Claims Act.))

21 The Court has serious doubts that the evidence of Dunton’s communications to  
22 Stanley can establish a reasonable belief by Dunton that he engaged in protected activity  
23 by reporting “any possible violation of any law or regulation.” Dunton does not identify  
24 any statute or regulation that he believes AEA violated. Although Dunton argues in his  
25 response that his conversation with Stanley “falls squarely within the confines and  
26 protections of 12 U.S.C. § 1790(b),” (Doc. 54, p. 13), that provision generally describes  
27 the relationship of federal credit unions to the NCUA. It does not relate to the preparation  
28 of financial forecasts or set forth any standards or requirements. *See Lang v. Nw. Univ.*,  
472 F.3d 493, 495 (7th Cir. 2006) (employee who alleges fraud with no reasonable basis  
for believing there was fraud is not protected from retaliation by the False Claims Act);  
*see also Green*, 507 F.3d 662 (plaintiff’s failure to identify conduct by defendant that  
violated the False Claims Act or conduct in which plaintiff even suspected that the  
defendant’s practice had led to a false statement was fatal to retaliation claim); *Bohac*,  
2012 WL 12884779, at \* 4 (finding plaintiff’s description of a myriad of complaints and  
criticisms she communicated to the NCUA about the management of defendant credit  
union insufficient to support inference that, “somewhere among those communications,  
she provided information regarding a possible violation of law or regulation.”).

1 Dunton, and Davidson and Twomey, the persons who communicated the termination to  
2 Dunton, were unaware of the content of any discussion Dunton had with Stanley. Dunton  
3 himself testified that he did not tell anyone at AEA about his conversation with Stanley,  
4 and Dunton acknowledged that he has no evidence that Stanley told anyone about the  
5 subject matter of their conversation.

6 In his response to the motion for summary judgment, Dunton argues that a causal  
7 connection exists because Sandberg, “after discovering that Plaintiff did speak with Mr.  
8 Stanley, . . . immediately terminated [him].” (Doc. 54, p. 15.) The fact that the termination  
9 followed the meeting is insufficient, in itself, to establish the casual connection. Dunton  
10 does not contend that meeting with Stanley was protected activity, and he points to no  
11 evidence to support an inference that Sandberg prohibited him from meeting with Stanley  
12 to prevent him from reporting alleged violations. His only evidence on this point is his  
13 subjective belief that Sandberg might have thought Dunton would report to Stanley that  
14 Sandberg wanted him to increase the numbers in the 2018 financial forecast beyond what  
15 he believed what was appropriate. But Dunton’s subjective belief is insufficient to  
16 establish a causal connection, and he fails to point to any evidence that the request to  
17 change the forecast was inappropriate, lacked foundation, or was contrary to law. (This  
18 is not surprising, as Sandberg’s requested changes to the forecast proved to be well-taken  
19 in light of subsequent events.) Consistent with the conclusion that there is no evidence  
20 that Sandberg’s forecast request was improper, Dunton admits that at no time did he  
21 complain to anyone at AEA that he was being asked to do something illegal, and he  
22 concedes that no one at AEA asked him to falsify any of the underlying financial data.  
23 The only concern Dunton raised to anyone at AEA was that he was not provided with  
24 enough guidance on what Sandberg wanted and that he believed creating three scenarios  
25 was a waste of his time. The Court must draw all reasonable inferences from the evidence  
26 in the nonmovant’s favor, but any such inferences must be reasonable in view of other  
27 undisputed background or contextual facts. *See T.W. Elec. Service v. Pac. Contractors*  
28 *Assoc.*, 809 F.2d 626, 632 (9th Cir. 1987). On the undisputed facts, no reasonable juror

1 could conclude that Sandberg wanted to prevent Dunton from meeting with Stanley  
2 because she thought Dunton would report to Stanley that AEA was pressuring Dunton to  
3 produce a fraudulent forecast.

4 Finally, Dunton could not have been terminated in retaliation for speaking to Stanley  
5 because the undisputed evidence shows that Sandberg decided to terminate Dunton on  
6 August 18, 2017, if he failed to complete the financial forecasts by August 23, 2017.  
7 Sandberg communicated this directive to Twomey and Davidson because she was going  
8 to be out of town on the day the forecasts were due. It is undisputed that Dunton failed to  
9 complete the financial forecasts by this deadline. “[A]n employer’s decision on a course  
10 of action made prior to learning of the employee’s protected activity does not give rise to  
11 an inference of causation.” *Yartsoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987)  
12 (citing *Miller v. Fairchild Indus., Inc.*, 730 F.3d 730, 731 n.1 (9th Cir. 1986)).

13 **B. AEA had a legitimate, non-retaliatory reason for terminating Dunton’s**  
14 **employment.**

15 AEA produced undisputed evidence showing that Dunton was terminated because he  
16 consistently failed to perform well, failed to meet deadlines, and exhibited poor  
17 communications with his peers and subordinates. Sandberg recommended Dunton’s  
18 termination in February 2017—six months before Dunton claims to have engaged in  
19 protected activity. Although Dunton was not terminated, he was placed on a PIP.  
20 Dunton’s subsequent performance was not satisfactory and the final straw was Dunton’s  
21 failure to prepare the 2018 financial forecast.

22 Dunton does not refute the reason for his termination, nor does he present any evidence  
23 from which a juror could reasonably conclude that retaliation motivated AEA’s  
24 termination of Dunton. At bottom, Dunton acknowledges that he was performing poorly.  
25 Dunton admits the facts underlying Sandberg’s decision to terminate him. Dunton admits  
26 that he did not provide the forecast required for the NCUA examination as directed and  
27 that he told his superior that certain forecasts she requested were a waste of time. He  
28 admits that he made mistakes during his employment, but claims those mistakes were

1 “blown out of proportion.” Dunton blames his subordinates for his mistakes and blames  
2 Sandberg for inadequate staffing and not giving him sufficient direction, but his  
3 explanations only support Sandberg’s observation in her February 22, 2017 performance  
4 review of Dunton that Dunton, “has not owned issues and failures, often putting those on  
5 people of the past or staff within the department even though he is ultimately responsible  
6 for decisions his team makes or does not make.”

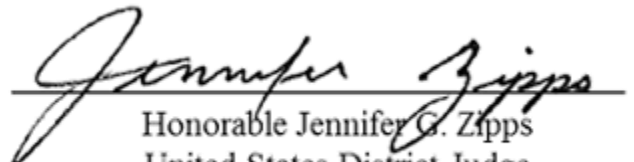
7 The record fully supports AEA’s assertion that it terminated Dunton for a legitimate,  
8 non-retaliatory reason – his poor performance. Dunton’s explanation for his poor  
9 performance does not suggest in any way that AEA’s reason was a pretext for retaliation.  
10 Dunton does not show that the proffered reason for his termination had no basis in fact,  
11 did not actually motivate the decision, or that the reason was insufficient to motivate the  
12 employment decision. *See Kittle*, 2010 WL 1949675, at \* 2

13 **IV. Conclusion**

14 For the foregoing reasons, the Court will grant AEA’s Motion for Summary Judgment.

15 IT IS ORDERED that Defendant’s Motion for Summary Judgment (Doc. 50) is  
16 GRANTED. The Clerk of Court is directed to enter judgment accordingly and to close  
17 the file in this action.

18 Dated this 19th day of August, 2020.

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21   
22 Honorable Jennifer G. Zipp  
23 United States District Judge  
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